

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP786

Cir. Ct. No. 2006SC7255

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHNNY LACY, JR.,

PLAINTIFF-APPELLANT,

V.

**PETER HUIBRETGSE, KELLY TRUMM, TIMOTHY GILBERG
AND CORRECTIONAL GUARD SHERMAN,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Johnny Lacy, Jr., an inmate at the Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin, appeals pro

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06).

se a judgment and an order denying his claim for monetary, injunctive and declaratory relief and granting the motion to dismiss of defendants Peter Huibretgse, Kelly Trumm, Timothy Gilberg and Correctional Guard Sherman (collectively, Huibretgse). We affirm.

¶2 On July 20, 2005, Lacy was demoted from Level-2 to Level-1 under the WSPF's now defunct inmate classification system. Lacy's cell was searched; several items of contraband were found and confiscated, including a glucose tablet, four graham crackers, several commercial photographs and three family photographs. These items were destroyed on September 2, 2005. Lacy asserts that he learned of the disposal of his property on September 20, 2005. Lacy filed two administrative complaints, the first on August 7, 2005, alleging that he was demoted to Level-1 without adequate due process. The other, filed on September 25, 2005, alleged that staff had destroyed his property without notifying him beforehand, as required by WIS. ADMIN. CODE § DOC 309.20(4)(d)1 (August 2001).

¶3 After these claims were denied and his administrative remedies were exhausted, Lacy filed a small claims action against Huibretgse seeking declaratory, injunctive and monetary relief. Lacy alleged his due process and equal protection rights were violated as a result of the demotion from Level-2 to Level-1, and by the destruction of his personal property without prior notice.

¶4 Huibretgse denied all allegations and moved to dismiss the complaint for failure to file a timely notice of claim as required by WIS. STAT.

§ 893.82 (2005-06).² Huibretgse further argued that sovereign immunity protected the defendants from any potential liability because the complaint failed to plead an exception to the general rule that state officers are immune from personal liability for injuries resulting from acts performed within the scope of their discretionary official duties.

¶5 Huibretgse later discovered that Lacy had filed two notices of claim, dated August 9, 2005 and January 12, 2006, respectively. The first contained multiple allegations regarding the destruction of Lacy's property without specific details regarding the time, date, or circumstances surrounding the destruction. The second contained various constitutional claims against Huibretgse, including deprivation of personal property, but it did not contain specific details regarding the time, date, or circumstances of the alleged deprivations of property.

¶6 On October 16, 2006, Huibretgse filed an amended motion to dismiss, which supplemented previous arguments by adding that the recently discovered notices of claim failed to satisfy the requirements of WIS. STAT. § 893.82.

¶7 The small claims court commissioner granted the motion to dismiss. Lacy requested a trial de novo before the circuit court. The circuit court entered a dismissal order finding that Lacy failed to comply with WIS. STAT. § 893.82, thus barring his state claims, and that the complaint failed to present a federal claim upon which relief could be granted. Lacy filed a motion for reconsideration, which was denied. Lacy appeals.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶8 We review *de novo* whether a pleading states a claim for which relief may be granted. *Heinritz v. Lawrence Univ.*, 194 Wis. 2d 606, 610, 535 N.W.2d 81 (Ct. App. 1995). We limit our review to the facts stated in the complaint. *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). Dismissal is proper when under no condition can the plaintiff recover. *Wilson v. Continental Ins. Cos.*, 87 Wis. 2d 310, 317, 274 N.W.2d 679 (1979).

¶9 We consider first Lacy's state law claims. Lacy contends the circuit court erred in concluding that he failed to state a claim under state law. He asserts that the August 9, 2005 and January 12, 2006 notices of claim fulfill the requirements of the notice of claim statute, WIS. STAT. § 893.82.³ Section 893.82 requires that a claimant filing an action against the State must serve notice of the claim with the attorney general within 120 days of the event giving rise to the action. The notice must state "the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of the

³ WISCONSIN STAT. § 893.82 provides, in pertinent part:

(2m) No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section.

(3) ... no civil action or civil proceeding may be brought against any state office, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties ... unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of the persons involved, including the name of the state officer, employee or agent involved.

persons involved, including the name of the state officer, employee or agent involved.” WIS. STAT. § 893.82(3). The statute mandates strict compliance with the section’s requirements. Sec. 893.82(2m).

¶10 We conclude that the August 9, 2005 and January 12, 2006 notices of claim fail to meet the requirements of WIS. STAT. § 893.82. While both notices refer generally to the destruction of personal property by WSPF staff, neither states the “time, date ... and circumstances” of the July 20, 2005 demotion in inmate classification and confiscation of personal property, or of the September 2, 2005 destruction of that property without prior notice. Both notices therefore do not strictly comply with the requirements of § 893.82.

¶11 Lacy’s failure to submit an adequate notice of claim does not necessarily doom all of his state law claims, however. Under *Casteel v. McCaughtry*, 176 Wis. 2d 571, 585-86, 500 N.W.2d 277 (1993), failure to file a notice of claim bars claims for monetary damages, but not those for declaratory or injunctive relief except “where the primary purpose of the suit is to seek monetary relief.” To determine whether Lacy’s claims for injunctive and declaratory relief are precluded by failure to comply with the notice of claim statute, we must examine whether the primary purpose of Lacy’s state claims is to obtain monetary relief.

¶12 Lacy’s small claims complaint indicates that he is seeking \$5000 in damages. His request for declaratory relief asks the court to pronounce that his rights under various constitutional and statutory provisions have been violated. His request for injunctive relief seeks to enjoin the defendants from: “making fraudulent writings on state documents”; “falsifying state documents”; and “interfering with prisoner’s rights under the United States and Wisconsin

Constitution[s] and laws: administrative code.” None of these requests for declaratory or injunctive relief references with specificity the main factual allegations in his complaint—that he was unfairly demoted to a lower inmate classification, and that his property was destroyed without the required notice. These facts are mentioned only in the first cause of action, for which Lacy seeks his monetary damages. We therefore conclude that the primary purpose of the suit was not to obtain injunctive or declaratory relief, but to seek monetary damages. Accordingly, we conclude that all of Lacy’s state claims for relief are precluded by his failure to file a notice of claim that meets the requirements of WIS. STAT. § 893.82.

¶13 We turn now to Lacy’s claims under federal law. Lacy argues that his procedural and substantive due process rights under the United States Constitution were violated due to the confiscation and destruction of property. We disagree. In *Richards v. Cullen*, 150 Wis. 2d 935, 939-40, 442 N.W.2d 574 (Ct. App. 1989), we concluded that a prison inmate has no inherent or absolute interest in his personal property while incarcerated and therefore may not raise a substantive due process claim based on property confiscation. Further, Lacy’s procedural due process claim fails because adequate post-deprivation remedies were available to him.⁴ See *Hudson v. Palmer*, 468 U.S. 517, 532-34 (1984) (inmate has no due process claim for intentional deprivation of property where state law provides suitable post-deprivation remedy). Accordingly, we conclude that Lacy’s federal due process claims also fail.

⁴ Lacy availed himself of these remedies, filing two inmate complaints and this small claims action.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)4.

